

The Honorable Ronald B. Leighton
Trial Date: March 14, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TROY X. KELLEY,

Defendant.

No. 3:15-cr-05198-RBL-1

**NON-PARTY OLD REPUBLIC
TITLE, LTD.'S BRIEF REGARDING
PRIVILEGED DOCUMENTS
SUBMITTED FOR *IN CAMERA*
REVIEW**

Defendant Troy Kelley served a trial subpoena on non-party Old Republic Title, Ltd. (“ORTL”) on January 14, 2016 requesting documents on seven different topics over a 16-year time span.¹ ORTL produced nearly 6,000 pages of documents in response, but withheld as privileged only 42 documents (and redacted 10 others) containing legal communications with its outside counsel (Scott Smith) and its in-house counsel (Rick Dosa). Defendant has challenged those privilege designations and demanded that ORTL submit the withheld documents to the Court for an *in camera* review outside the presence of counsel, which ORTL has agreed to do. This brief is submitted with those documents to outline ORTL’s process and parameters for asserting privilege, and describe the withheld documents and the basis for ORTL’s privilege claims. ORTL is submitting hard copies to the Court of the challenged documents, along with electronic versions of larger Excel spreadsheets attached to certain of these communications.

1. ORTL’s Careful Process and Parameters Used to Determine Privilege.

ORTL only asserted privilege over a small number of documents responsive to a single category in Defendant’s subpoena, Topic 1, which called for documents regarding ORTL’s use of proceeds from the May 3, 2011 civil settlement between ORTL and Defendant. Those documents concerned ORTL’s refund of a portion of those settlement proceeds to its customers, and involved legal advice and analysis from two lawyers: (1) Scott Smith, ORTL’s outside counsel, and (2) Rick Dosa, in-house counsel.

ORTL was very careful and deliberate in asserting privilege. Most of the communication involving Messrs. Smith or Dosa about the refund program were classic legal analysis about its use, scope and parameters. However, a handful of communications including these counsel addressed non-legal, administrative aspects of the refund program. Insofar as ORTL determined in its privilege review that communications about the refund program were administrative or did not include legal advice – notwithstanding that they involved Messrs. Smith and/or Dosa – ORTL did not assert privilege over them and produced them (ORTL in no way intended such

¹ A copy of that subpoena is attached as Exhibit A to the accompanying Declaration of Gavin Skok.

production as a broad waiver of any attorney-client privilege, work product immunity or any other applicable privilege). ORTL only withheld on privilege those documents it truly felt were legal advice and communications.

2. The Documents ORTL Withheld Contain Legal Advice and Attorney-Client Discussions, and Therefore are Privileged.

ORTL withheld the following documents, which are identified by a "DOC #" corresponding to the numbering on the log attached to the accompanying Skok Declaration:

- **Privileged Docs 1-3:** These May 4 & 5, 2011 emails (subject "Reconveyance Transactions" and "Master Reconveyance Spreadsheet") are privileged communications between counsel (Scott Smith, Rick Dosa) and Lynn Levendowski (an Old Republic officer) regarding settlement of the *Kelley* lawsuit and consideration of a refund program and its parameters.
- **Privileged Docs 4-11:** These June 2011 emails (subjects "Kelley – draft of proposed refund program", "Kelley – proposed refund program", "Kelley – revised proposed refund program", and "Kelley – Draft Memo re Use of Settlement Funds") are legal discussion and analysis between in-house counsel (Dosa) and outside counsel (Smith) regarding decision-points and potential parameters of any refund program. They also discuss and attach a June 2011 legal analysis memorandum from Mr. Smith, subject "Proposed Refund Program," that is captioned "PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT MEMORANDUM" and gives legal analysis. Document 9 is counsel's report to Old Republic's officers about these matters and counsel's legal advice.
- **Privileged Doc 12:** This July 16, 2011 email (subject "Kelley and Refunds") includes legal discussion between Messrs. Smith and Dosa about the parameters and timing of a potential refund program.
- **Privileged Doc 13:** This July 21, 2011 email (subject "Refunds") is a letter drafted by outside counsel (Smith) along with brief legal discussion of notice and refund matters, directed to Ms. Levendowski for review and comment, with copy to Mr. Dosa.

- 1 • **Privileged Docs 14-29 & 32-36:** These July and August 2011 emails (subject “Kelley –
2 Revised Proposed Refund Program”) are communications containing legal advice given by
3 Messrs. Smith and Dosa, and received by Mr. Dosa and other Old Republic employees,
4 regarding the parameters of a proposed refund program and how to structure it. Insofar as
5 later emails in these chains related solely to implementation steps or administrative actions,
6 ORTL has produced those portions with these privileged portions redacted as **Redacted Docs**
7 **1-8.**
- 8 • **Privileged Docs 30-31:** These August 22, 2011 emails (subject “PCD Refund Letter”)
 - 9 include privileged communications between counsel (Smith, Dosa) and Levendowski
 - 10 regarding the parameters of a refund program, including communication of information to
 - 11 counsel for purposes of legal analysis and a request for legal advice.²
- 12 • **Privileged Docs 37-40:** These January 24, 2012 emails (subject “uncashed PCD refund
13 checks”) include requests for legal advice to counsel (Dosa, Smith) from Old Republic
14 employees (Frets, Levendowski) regarding legal aspects of refund payment issues and
15 disposition of uncashed refund checks.
- 16 • **Privileged Doc 41:** This January 30, 2012 email (subject “returned PCD letters”) is a
17 request from Ms. Levendowski to counsel (Mr. Dosa) for legal advice regarding refund
18 payment issues.
- 19 • **Privileged Doc 42:** This August 17, 2011 email (subject “Revised Refund Letter”) is an
20 attorney communication from Mr. Smith to Ms. Levendowski with counsel’s comments on a
21 draft letter to ORTL customers.
- 22 • **Redacted Doc 9:** This May 4, 2011 email (subject “Kelley settlement – next steps”) was
23 redacted to remove privileged communications between outside counsel (Smith) and in-
24 house counsel (Dosa) regarding payment of Defendant’s civil settlement with ORTL.

25 ² “[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the
26 giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn Co. v. United States*,
449 U.S. 383, 390-91 (1981).

- **Redacted Doc 10:** The attachment to the May 3, 2011 email, subject “ATTORNEY CLIENT PRIVILEGED WORK PRODUCT ORT vs. Kelly,” from Carl Lago of Old Republic to Lynn Levendowski is an Excel spreadsheet that was prepared by outside counsel in the course of litigation and relates to litigation issues. As such, it is both work product and attorney-client privileged. ORTL has produced the cover email, but the Excel sheet attachment has been redacted and withheld. Because of its size, it is being provided to the Court electronically in its native format.

3. Conclusion

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.” *Upjohn*, 449 U.S. at 389. To further those purposes, and to protect the sanctity of ORTL’s communications with its counsel regarding legal matters, ORTL respectfully requests that the Court affirm its privilege assertions and decline to order that ORTL produce any of the documents submitted for *in camera* review to Defendant.

DATED this 10th day of March, 2016.

RIDDELL WILLIAMS P.S.

By /s/ Gavin W. Skok
Gavin W. Skok, WSBA #29766
Attorneys for Old Republic Title, Ltd.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am employee of RIDDELL WILLIAMS P.S., and that on the date written below, I electronically filed the following document with the clerk of the court using the CM/ECF system, and served a true and correct copy of the foregoing document in the manner below stated:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on the 10th day of March, 2016, at Seattle, Washington.

/s/ Courtney R. Tracy
 Courtney R. Tracy